OGC 70-1638

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES

Washington, D. C., September 21, 1970

25X1 [redacted]
Assistant General Counsel
Central Intelligence Agency
Washington, D. C. 20505

25X1 Dear [redacted]

Pursuant to our telephone conversation of today, I am attaching the following information:

1. A copy of my May 12, 1970, letter to the Comptroller General (Comp. Gen. File # B-169801). It is my understanding that you are in possession of all documents referred to in this letter. While 25X1 [redacted] is generally familiar with our controversy, it was my under- 25X1 standing that a [redacted] worked most closely on this matter.

2. A copy of a June 9, 1970, letter from Mr. Curtis L. Wagner, Jr., to a Mr. John Higgins, of the General Accounting Office, indicating that Mr. Wagner is now recommending payment of the surcharge.

3. A copy of the Fairfax County Tax as adopted by the Board of Supervisors.

4. A copy of a September 2, 1970, letter from me to Mr. Leonard E. Shinn of the General Services Administration.

Please let me know if I can supply you with any additional information.

Sincerely,

Ron

Ronald J. Roessler
Attorney

RJR:tac
Attachments (4)

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9 June 1970

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Mr. John Higgins
Office of General Counsel
General Accounting Office
441 G Street, N. W.
Washington, D. C. 20548

Re: Letter of The Chesapeake and Potomac Telephone Companies; dated 12 May 1970 - Arlington County Surtax

Dear Mr. Higgins:

In the light of informal telephonic conversations between you and personnel of Tax & Property Law Team, OTJAG-A regarding the matter raised by the above referenced letter, the tentative decision that the item referred to should not be paid has been reconsidered. Accordingly, the operating element, Defense Telephone Service - Washington, has been advised to pay the questioned item as billed and to remit amounts withheld promptly to the telephone company.

Sincerely yours,

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Office

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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES

1710 H STREET, NORTHWEST

WASHINGTON, D. C. 20006

TELEPHONE
AREA CODE 202
637-9900

May 12, 1970

Comptroller General of the
United States
441 G Street, N. W.
Washington, D. C. 20548

Attention Mr. J. Edward Welch,
Assistant General Counsel

Sir:

The Chesapeake and Potomac Telephone Company of Virginia (hereafter called "Company") hereby submits this request for a determination concerning the liability of the Department of Defense and other governmental agencies for certain amounts billed in connection with local telephone service furnished to the Federal agencies at various locations in the County of Arlington, Virginia. The specific item in dispute is the additional amount or surcharge billed to the Department of Defense and other Federal agencies, as well as all other Arlington subscribers, which is imposed under tariff to partially defray the cost of the local business privilege license tax levied on the Company. As of May 1, 1970, the amount due pursuant to this surcharge provision is $150,168.60.

There is not believed to be any dispute concerning the relevant facts or the computation of these charges. The Company submitted a letter setting out the factual background and applicable authority to Mr. Curtis L. Wagner, Jr., Chief, Regulatory Law Office, Department of Army, on February 26, 1970. A copy of this letter is attached as Appendix A. The grounds for rejection of the claim are set out in a letter from Mr. Wagner, dated March 27, 1969, which is attached as Appendix B.

Subsection (b) of Section 11-70 of the Business Privilege License Ordinance of Arlington County (a copy of which is attached as Appendix C) reads in applicable part as follows:

> (b) Telephone Companies. All persons engaged in the business of providing telephonic communication in the county shall pay for the

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> privilege an annual license tax equal to two percent of the gross receipts, as hereinabove defined, from local telephone exchange service within the county, during the preceding fiscal or calendar year, excluding however business done between the county and points outside the state.

The Company is thus taxed by Arlington County on its receipts from all local service customers, including agencies of the Federal Government. Revenue from Federal agencies was exempt from tax prior to 1969, but this exemption was deleted for tax years beginning with 1969. The Company has paid the Business Privilege License Tax based on the receipts from all local service customers for the tax years 1969 and 1970.

As a public utility, the Company files its rates and charges for local telephone service with the Virginia State Corporation Commission. These filed rates are known as the "tariffs," and define the terms on which telephone service is provided. The service involved in this dispute is provided to the Federal agencies on the terms and conditions specified in these tariffs.

Additional charges were placed on the bills of the Department of Defense and other Federal agencies for periods subsequent to January 1, 1969 pursuant to tariff No. 201-§ 1, paragraph D-6 (a copy of which is attached as Appendix D), which reads in part as follows:

> D. PAYMENT ARRANGEMENTS AND CREDIT ALLOWANCES
>
> 6. Adjustments for Certain Local Taxes and Fees
>
> When a political subdivision of the state charges the Company a license tax or franchise fee at a flat rate or based on receipts or based on poles, wires or conduits, so much of the aggregate amount of such taxes and fees as exceeds one-half of one per cent of the aggregate bills of such customers for exchange service will be billed pro rata to the exchange customers receiving service within the political subdivision.

The Department of Defense refused and still refuses to pay any additional charges so billed. The only reason ever given the Company by the Department for its refusal to pay is that set forth in the March 27, 1969 letter (Appendix B).

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Various meetings and informal contacts between the Company and the Department have proven fruitless. On February 2, 1969 a conference was held between various representatives of the Company and the Department. Following this conference, the Department, through its letter dated March 27, 1969, rejected the Company's claim. After submission of the memorandum dated February 26, 1970 (Appendix A), the Company was informed that the Department is "standing by" the position previously set forth in its letter. The Company was further informed that the Department considered a Comptroller General opinion on this question to be desirable. The Department has not supplied the Company with any explanation of its legal position other than that contained in Appendix B.

The Company's legal position is set forth in detail in Appendix A. Among the authority cited therein is the opinion of the Comptroller General reported at 45 Comp. Gen. 192, which recognizes the validity of a telephone company surcharge under tariff to the Department of Army to defray the cost of a state tax. An unpublished opinion of the Comptroller General (B-167999, dated December 31, 1969) also upholds the legality of such charges. The General Telephone Company of California was authorized by the California Public Utilities Commission to impose a surcharge (applicable to intrastate operations) on each local service customer bill to recover increased tax expenses attributable to the Company's payment of the Federal surtax. In certifying such additional charges for payment, the Assistant Comptroller General pointed out that the "Allowance for Federal Income Tax Surcharge" appearing on each bill "is not a tax but a temporary rate increase authorized by the Commission . . . ." The opinion continued:

> . . . we might point out that this "Surcharge" is not a tax imposed on the United States (by the United States) but rather is, in effect, a tax imposed on any income tax payable by a taxpayer to the United States. Under these circumstances we are aware of no reason why a taxpayer engaged in a business may not consider the "Surcharge" as a cost element in fixing the prices to be charged for his wares or services.

These opinions are two of a number in which the Comptroller General has held the Federal Government liable for the payment of additional charges based on a state tax, the incidence of which was on a vendor.

Shortly after the opinion of the Supreme Court in the case of Alabama v. King & Boozer, 314 U.S. 1 (1941), the Comptroller General

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recognized the applicability of the holding to the type of situation involved in this dispute. See 21 Comp. Gen. 843 (1942). That opinion involved the question of whether the Federal Government should continue to seek reimbursement from the State of North Dakota for amounts paid for gasoline in North Dakota attributable to a North Dakota tax on gasoline. Comptroller General Warren answered the question in the negative and further stated that the King & Boozer case left no doubt "that a vendor who sells supplies to the United States is not - merely because of the immunity of the Federal Government from State taxation - exempt from the payment of a State tax . . . unless the legal incidence of the tax is upon the vendee." The opinion carefully noted that "the tax" was "not to be regarded as being passed on, as such, merely because the price to the purchaser is increased because of the tax." The opinion continued:

> Such being the case it would appear that the price required to be paid by your Department, or any other agency of the United States, for such gasoline as may be purchased by it in the State of North Dakota may not be viewed as including, as such, the tax imposed on gasoline dealers by the provisions of the North Dakota statute, supra, although the sale price of the gasoline may have been increased by reason of the imposition of such tax on the vendor; and as it thus appears that the tax loses its identity as such and is merged in the purchase price paid by the Federal agency, the theory that the United States is entitled to purchase gasoline from dealers in the State of North Dakota at a price exclusive of the amount of the State tax, or to recover the amount of the tax from the State, is no longer tenable.

The opinion at 24 Comp. Gen. 150 (1944) further refutes the argument that an increase in charges made by a vendor to the Federal Government, based on a tax, in itself amounts to taxation. That situation involved gasoline taxes similar to that considered at 21 Comp. Gen. 843. In reemphasizing the position taken in his earlier opinion, Comptroller General Warren stated:

> . . . since it is clear that a tax which rests upon a vendor cannot properly be regarded as being passed on, as such, to a vendee because the purchase price of the gasoline involved in a particular case includes an amount representing a charge on account of the tax, it must be concluded that there is no reasonable basis on which

> the United States may seek a refund . . . on account of the applicable tax in the case of service station deliveries of gasoline. . . .

The opinion at 32 Comp. Gen. 423 (1953) involved a municipal business privilege tax on a vendor not unlike that imposed on the Company by Arlington County. In that situation, the tax was imposed by the municipality on a contractor who furnished gasoline to the Federal Government under a contract providing for a price adjustment for any increase in taxes levied after the contract date. The contract provided that if any government imposed or increased any tax on the contractor, "the contract price shall be correspondingly increased." In holding that the contractor should be reimbursed for the tax imposed and paid after the contract date, Comptroller General Warren concluded:

> Since the tax appears to be . . . a license tax upon the privilege of engaging in business . . . , it is apparent that the legal incidence of the tax rests upon the seller rather than the purchaser and consequently the constitutional principal under which the Federal Government is immune to State taxation is not applicable thereto.

A more recent unpublished opinion applying this principle to business privilege taxes is Opinion B-167150, dated February 17, 1970.

The decision at 33 Comp. Gen. 453 (1954) also involved the purchase of gasoline. A section of the Vermont statutes provided for a tax of five cents per gallon upon each gallon sold by the distributor. The statute then stated that "the distributor shall collect such tax from the dealer and the dealer from the consumer." While the opinion noted that the quoted language left some doubt as to the legal incidence of the tax,

> . . . it appears clear that such tax is in fact imposed upon the distributor rather than the consumer of the gasoline. Should the distributor for any reason fail to collect the tax, his liability therefore is in no way affected. Hence, it is the view of this Office that the legal incidence of the Vermont gasoline tax is upon the distributor and, consequently, the constitutional principle under which the Federal Government is immune to state taxation is not applicable thereto. See Esso Standard Oil Company v. Evans, 345 U.S. 495, and 24 Comp. Gen. 150.

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We are not aware of any reasonable basis for distinguishing these opinions of the Comptroller General from the situation at hand. Your consideration of this matter is greatly appreciated.

Very truly yours,

Ronald J. Roessler

Ronald J. Roessler,
Attorney for the Company
1710 H Street, N. W.
Washington, D. C. 20006
392-8982

RJR/pjf

cc: Curtis L. Wagner, Jr., Esq.
Chief, Regulatory Law Office
Department of Army
Office of the Judge Advocate General
Washington, D. C. 20310

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ADOPTION OF AMENDMENTS TO CHAPTER 25 OF THE 1961 CODE OF THE COUNTY OF FAIRFAX, VIRGINIA, AS AMENDED

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the County Administration Building at Fairfax, Virginia, on Wednesday, July 1, 1970, the Board, after having given notice of its intention so to do, in the manner prescribed by law, adopted certain amendments to Chapter 25, Article VII, of the 1961 Code of the County of Fairfax, Virginia, as amended, said amendments so adopted being in the words and figures following, to-wit:

Financing accounts receivable
Inventory financing
Installment financing
Chattel mortgage financing
Consumer financing
Buying installment receivables

Section 25-52 Premium Stamp Suppliers

Every person engaged in the business of furnishing or supplying for any consideration to others to use in, with or for the sale of goods, merchandise or commodities any stamps, coupons, tickets or similar devices which entitle the person receiving the same with such sale to procure any goods, merchandise or commodities free of charge or for less than the market price thereof, or to receive cash for such premium stamps shall pay for the privilege an annual license tax to be measured by the value of such premium stamps furnished or supplied during the next preceding year. The amount of the tax hereunder shall be $20.00 on the first $2,000.00 of value of premium stamps sold the next preceding year, and $0.10 for each additional $100.00 of value of premium stamps sold the next preceding year. The word "value" as used herein shall mean the average value if sold at retail of the goods, merchandise, or commodities for which the premium stamps may be redeemed.

Section 25-53 Telephone Companies

All persons engaged in the business of providing telephonic communications in the County shall pay for the privilege an annual license tax equal to two (2) percent of the gross receipts during the next preceding year, as hereinbefore defined, from local telephone exchange service, including flat rate service and message rate service; and intrastate long distance calls from within the County, excluding business done between the County and points outside the state.

Section 25-54 Heat, light, power and gas companies

All persons furnishing heat, light, power and gas for domestic, commercial and industrial consumption in the County shall pay for the privilege an annual license tax equal to one-half of one per cent of the gross receipts, as hereinabove defined, of such business derived from within the County during the next preceding year, calendar or fiscal year.